

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

DUNCAN K ROBERTSON,

CASE NO. C12-2017-MJP

Plaintiff,

## ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

V.

## GMAC MORTGAGE LLC,

Defendant.

This matter comes before the Court on the motion of Defendant First American Title Insurance Company (“First American”) for summary judgment. (Dkt. No. 50.) Having reviewed the motion, Plaintiff’s response (Dkt. Nos. 64-68), Defendant First American’s reply (Dkt. No. 79), and all related papers, the Court GRANTS the motion.

## Background

This case concerns a piece of property in Seattle, Washington, currently owned by plaintiff. (Dkt. No. 4-1 at 4.) The relevant facts of this case begin in 1999 when the property's original owner, Linda Nicholls, executed an adjustable rate note for \$100,000 from Old Kent Mortgage Company. (Dkt. No. 64-1 at 4.) To secure the note, Nicholls executed a Deed of

1 Trust against the property in favor of Old Kent Mortgage Property. (Dkt. No. 51-1 at 15.) The  
 2 Nicholls Deed of Trust was recorded in King County. (Id. at 2.) The parties agree the Nicholls  
 3 Deed of Trust continues to encumber the property.<sup>1</sup>

4       Approximately six years later, Nicholls borrowed money from Plaintiff, which was  
 5 secured by a third-position deed of trust. (Dkt. Nos. 51-3, 51-4). When Nicholls defaulted,  
 6 Robertson foreclosed on his deed of trust. Robertson purchased the property. (Dkt. No. 51-2 at  
 7 2.) The property remained subject to the Nicholls Deed of Trust. (Dkt. No. 4-1 at 9). Robertson  
 8 continues to own the property. (Dkt. No. 4-1 at 8.)

9       First American had limited involvement in these events. In February 2007, First  
 10 American was appointed successor trustee on the Nicholls Deed of Trust. (Dkt. No. 51-4.) It  
 11 held that position for approximately 3 years, until LSI Title Agency, Inc. (“LSI”) was appointed  
 12 successor trustee. (Dkt. No. 51-5) During its tenure as successor trustee, First American issued  
 13 three notices of trustee sales. (Id. at 7, Dkt Nos. 51-7, 51-8.) The prospective date of each sale  
 14 was 6/15/2007, 4/17/2009 and 6/25/2010. (Id.) In each instance, First American discontinued  
 15 the trustee sales before any sale. (Dkt. Nos. 51-7 at 8, 51-8.) In a letter dated October of 2009,  
 16 Plaintiff’s counsel altered First American of Plaintiff’s ownership of the property and requested  
 17 any pending sales be discontinued. (Dkt. No. 65.) The record is unclear about whether Plaintiff  
 18 knew of the 2007 and 2009 trustee sales before First American discontinued them. (Id.) The  
 19 letter indicates Plaintiff had not received notices for either of those trustee sales. (Id.)

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24       <sup>1</sup> Plaintiff asserts in the complaint that Nicholls has “no power to grant the Nicholls  
 DOT.” Plaintiff offers no evidence on summary judgment however to support this position.

1 First American now moves for summary judgment on all of Plaintiff's claims. Robertson  
 2 did not file a response brief, but did file several declarations in opposition to summary judgment.  
 3 (Dkt. No. 64-68.)

4 **Analysis**

5 **A. Legal Standard**

6 Summary judgment is appropriate when, viewing the facts in the light most favorable to the  
 7 nonmoving party, there is no genuine dispute as to any material fact that would preclude the  
 8 entry of judgment as a matter of law. L.A. Printed Indus., Inc. v. Aeropostale, Inc., 676 F.3d  
 9 841, 846 (9th Cir. 2012). The party seeking summary dismissal of the case "bears the initial  
 10 responsibility of informing the district court of the basis for its motion" and identifying those  
 11 portions of the materials in the record that show the absence of a genuine issue of material fact.  
 12 Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Fed.R.Civ.P. 56(c)(1). Once the moving  
 13 party has satisfied its burden, it is entitled to summary judgment if the non-moving party fails to  
 14 identify specific factual disputes that must be resolved at trial. Hexcel Corp. v. Ineos Polymers,  
 15 Inc., 681 F.3d 1055, 1059 (9th Cir. 2012). The mere existence of a scintilla of evidence in  
 16 support of the non-moving party's position will not preclude summary judgment, however,  
 17 unless a reasonable jury viewing the evidence in the light most favorable to the non-moving  
 18 party could return a verdict in its favor. U.S. v. Arango, 670 F.3d 988, 992 (9th Cir. 2012).

19 **B. Wrongful Foreclosure**

20 Plaintiff contends First American violated Washington's Deed of Trust Act ("DTA") by  
 21 wrongfully initiating foreclosure proceedings. The DTA establishes the procedures and  
 22 requisites for nonjudicial foreclosure of residential property. See e.g. RCW 61.24.040. In  
 23 enacting the DTA, the Washington legislature sought to promote three primary goals: "(1) that  
 24 the nonjudicial foreclosure process should be efficient and inexpensive; (2) that the process

1 should result in interested parties having an adequate opportunity to prevent wrongful  
 2 foreclosure; and (3) that the process should promote stability of land titles.” Plein v. Lackey,  
 3 149 Wn.2d 214, 225 (2003). Under certain circumstances, the DTA allows for the recovery of  
 4 actual monetary damages where the borrower has failed to enjoin the trustee’s sale and seeks  
 5 damages arising from the trustee’s failure to comply with the requirements of the DTA.  
 6 McDonald v. OneWest Bank, 2013 WL 858178, \*5 (W.D.Wash.,2013) But, Washington law  
 7 draws the line at recovery of damages only where an actual sale occurs. (Id.) Until that time, a  
 8 borrower’s only remedy under the DTA is to seek to enjoin the sale. (Id. at \*5-6.)

9 Plaintiffs claim for damages against First American for irregularities in foreclosure  
 10 proceedings fails as a matter of law. There is no dispute Plaintiff still has possession of his  
 11 property and First American never participated in a fully realized trustee sale. Although  
 12 Robertson complains about some aspects of the notices First American sent, even if true, there is  
 13 no cause of action where no sale occurs. See Vawter v. Quality Loan Serv. Corp. of Wash., 707  
 14 F.Supp.2d 1115, 1123 (W.D.Wash.2010). Here, First American cancelled all three trustee sales.  
 15 Consequently, Plaintiff has no claim for wrongful initiation of foreclosure proceedings against  
 16 First American. The Court GRANTS summary judgment as to the DTA claim.

17 C. Breach of Fiduciary Claim

18 Next, Plaintiff claims First American violated its fiduciary duty to him. This claim also fails  
 19 as a matter of law because a trustee has no fiduciary duty to a person with interest in the  
 20 property. Washington law explicitly rules out such a duty:

21 The trustee or successor trustee shall have no fiduciary duty or fiduciary  
 22 obligation to the grantor or other persons having an interest in the property subject  
 23 to the deed of trust.

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1 RCW 61.24.010(3). Because First American had no fiduciary obligation to Plaintiff, his claim  
2 fails and summary judgment is granted to First American.

3 D. CPA

4 Defendants argue the CPA claim is legally insufficient. The Court agrees.

5 The elements of a Consumer Protection Act (“CPA”) claim in Washington are (1) an unfair  
6 or deceptive act or practice, (2) occurring in trade or commerce, (3) impacting the public interest,  
7 (4) resulting in injury to the plaintiff in his business or property, and (5) causation. Hangman  
8 Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 780 (1986).

9 Plaintiff cannot establish the first element of a CPA claim. The CPA does not define “unfair  
10 or deceptive” for purposes of the first element. Whether an act is unfair or deceptive is a question  
11 of law. Leingang v. Pierce County Med. Bureau, Inc., 131 Wn.2d 133, 150 (1997). Washington  
12 courts have held that a deceptive act must have the capacity to deceive a substantial portion of  
13 the population ( Sing v. John L. Scott, Inc., 134 Wn.2d 24, 30 (1997)) and “misleads or  
14 misrepresents something of material importance” (Holiday Resort Cnty. Ass'n v. Echo Lake  
15 Assocs., LLC, 134 Wn. App. 210, 226 (2006)).

16 Plaintiff’s claim is premised on the notion that First American’s issuance of allegedly  
17 defective notices of trustee sale violates the DTA and thereby constitutes a per se violations of  
18 the CPA. (Dkt. No. 4-1.) This Court cannot find any authority for such a proposition and  
19 Plaintiff does not cite any. Nor does Plaintiff present any argument as to how these alleged  
20 violations are otherwise deceptive or constitute an unfair business practice, which deceives a  
21 substantial portion of the population.

22 Plaintiff’s claim also fails because he cannot show First American’s conduct cause any injury  
23 or damage. “Personal injuries, as opposed to injuries to ‘business or property,’ are not  
24 compensable and do not satisfy the injury requirement.” Panag v. Farmers Ins. Co. of Wash., 166

1 Wn.2d 27, 57 (2009). Plaintiffs may not, therefore, recover for any emotional distress caused by  
 2 defendants' deceptive acts. With regard to any claimed damages, "plaintiff must establish that,  
 3 but for the defendant's unfair or deceptive practice, the plaintiff would not have suffered an  
 4 injury." Indoor/Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc., 162 Wn.2d 59, 84  
 5 (2007).

6 First, as to injury, Plaintiff does not offer any explanation or legal theory on this element of a  
 7 CPA claim. Second, even if injury existed, the record lacks any evidence First American's  
 8 actions proximately cause any damage to him. Specifically, Plaintiff alleges in his Complaint the  
 9 loss of use of the property, a loss of revenue, and other losses suffered from liquidating securities  
 10 in anticipation of a settlement with the holder of the Nicholls Note. But, these damages cannot be  
 11 laid at defendant's feet. Plaintiff purchased property subject to a first-position deed of trust.  
 12 Regardless of the acts of First American, Plaintiff's property was still subject to the Nicholls'  
 13 deed of trust and his ability to sell or develop the property—the damages he claims—necessarily  
 14 limited. Plaintiff's CPA claim fails as a matter of law.

15 E. Little RICO

16 Washington enacted the Criminal Profiteering Act, RCW 9A.82, or "little RICO" to combat  
 17 organized crime. Winchester v. Stein, 135 Wn.2d 835, 849 (1998). The statute requires an injury  
 18 to a person, business or property by an act of criminal profiteering, which requires a commission  
 19 of specific enumerated felonies for financial gain, that is part of a pattern of criminal profiteering  
 20 (three or more acts within a five year period that are similar or interrelated to the same  
 21 enterprise) and damages. RCW 9A.82.010(4).

22 Here, Plaintiff fails to establish any genuine issue of material fact First American violated  
 23 RCW 9A.82. Liability under RCW 9A.82 is limited in scope only to the specific felonies listed  
 24 in the statute, including organized retail theft, arson, kidnapping, and commercial bribery. RCW

1 9A.82.010(4). In contrast to those acts, First American's only participation with the events of  
 2 this case was to issue three notices of trustee sales. Because sending a notice of a trustee sale,  
 3 even if they were defective under the DTA's requirements, are not listed as one of the specific  
 4 enumerated felonies constitute indictable criminal acts under Washington law, First American  
 5 cannot be liable under RCW 9A.82. The Court GRANTS summary judgment in favor of First  
 6 American on this claim.

7 F. Outrage

8 An Intentional Infliction of Emotional Distress ("IIED") claim in Washington requires (1)  
 9 extreme and outrageous conduct, (2) intentional or reckless infliction of emotional distress, and  
 10 (3) the actual result to the plaintiff of severe emotional distress. Kloepfel v. Bokor, 149 Wn.2d  
 11 192, 195-96 (2003). The conduct must be "so outrageous in character, and so extreme in degree,  
 12 as to go beyond all possible bounds of decency, and tend to be regarded as atrocious, and utterly  
 13 intolerable in civilized society." Id. at 196. Whether particular conduct rises to the requisite level  
 14 of outrageousness is "ordinarily a question of fact for the jury." Dombrosky v. Farmers Ins. Co.  
 15 of Washington, 84 Wn. App. 245, 261 (1996). The Court, however, may dismiss a claim if  
 16 reasonable minds could not differ as to whether the alleged conduct was sufficiently extreme. Id.  
 17 at 261-62.

18 Here, Plaintiff does not establish a prima facia case of outrage. First, no reasonable mind  
 19 could find First American's alleged conduct, of sending three notices of trustee sales, as  
 20 outrageous. Nor has he put forward any evidence to support an allegation that First American  
 21 intentionally sought to inflict emotional distress. Finally, Plaintiff does not offer any evidence  
 22 showing the notices of trustee sale, as opposed to other defendants' acts, cause him severe

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1 emotional distress. As such, his claim for intentional infliction of emotional distress cannot  
 2 proceed.

3 G. Fraud

4 To succeed past the summary judgment stage, Plaintiff must prove all nine elements of a  
 5 claim for fraud. The nine elements of fraud are (1) representation of an existing fact, (2)  
 6 materiality, (3) falsity, (4) the speakers knowledge of the falsity, (5) intent of the speaker that it  
 7 should be acted upon by the plaintiff, (6) plaintiff's ignorance of the falsity, (7) plaintiff's  
 8 reliance on the truth of the representation, (8) plaintiff's right to rely on it, and (9) damages  
 9 suffered by the plaintiff. Stiley v. Block, 130 Wn.2d 498, 504 (1996).

10 Discerning the contours of Plaintiff's fraud claim is difficult because his complaint only  
 11 generally alleges wrong-doing by First American and he did not file a responsive brief to this  
 12 motion for summary judgment. (Dkt. No. 4-1.) But, he appears to plead a fraud claim on the  
 13 basis First American failed to confirm the holder of the Nicholls Note prior to issuance of these  
 14 notices.

15 Plaintiff's claim for fraud against Robertson fails on the element of damages. To succeed  
 16 on a fraud claim Plaintiff must show the purported fraudulent representation was the proximate  
 17 cause of his alleged damages. See Turner v. Enders, 15 Wn. App. 875 (1976) (holding that  
 18 damages for fraud are measured by all losses proximately caused by the fraud). Here, as  
 19 discussed in the preceding sections, Plaintiff bought property subject to a first-position deed of  
 20 trust. His subsequent inability to develop the property is a result from his purchase choice and  
 21 not from First American's issuance of three notices of trustee sales, which were cancelled. The  
 22 Court grants summary judgment to First American on this claim too.

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## Conclusion

Because there is no genuine issue of material fact needing resolution at trial against First American, the Court GRANTS the motion for summary judgment.

The clerk is ordered to provide copies of this order to all counsel.

Dated this 3rd day of April, 2013.

Wasson, Releman

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Marsha J. Pechman  
Chief United States District Judge